

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

City of Alma, Michigan

Docket No. SC97-4-001

OPINION NO. 452-A

Issued: November 7, 2001

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
William L. Massey, Linda Breathitt,  
and Nora Mead Brownell.

City of Alma, Michigan

Docket No. SC97-4-001

OPINION NO. 452-A  
ORDER DENYING REHEARING

(Issued November 7, 2001)

On July 30, 2001, the Commission issued its Opinion Affirming in Part and Modifying in Part Initial Decision, 96 FERC ¶ 61,163 (2001) (July 30 Order). The July 30 Order established the stranded cost obligation of the City of Alma, Michigan (Alma) in the event Alma uses the transmission system of Consumers Energy Company (Consumers Energy) to access an alternative power supply. On August 24, 2001, Consumers Energy filed a request for rehearing of the July 30 Order. In this order, we deny Consumers Energy's request for rehearing. This order benefits customers because it sets Alma's stranded cost obligation at a reasonable level.

I. Background

In the July 30 Order, the Commission affirmed the Initial Decision's finding that Alma would be responsible for paying stranded costs to Consumers Energy if Alma becomes a retail-turned-wholesale transmission customer of Consumers Energy and uses Consumers Energy's transmission system to reach an alternative power supply.<sup>1</sup> However, the July 30 Order modified the Initial Decision's finding with respect to Alma's stranded cost obligation. Among other things, the Commission found that the beginning of the reasonable expectation period, or L, is January 1, 1990; the duration of L is 15 years; distribution costs were properly deducted from the revenue stream estimate (RSE); and it was procedurally proper for the judge to consider alternatives to Alma's

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<sup>1</sup>City of Alma, Michigan, 88 FERC ¶ 63,002 (1999).

construction of its own distribution system. Consumers Energy seeks rehearing of these findings.

## II. Request for Rehearing

### A. Beginning of L Date

The July 30 Order concluded that Consumers Energy had a reasonable expectation of continuing to serve Alma, and therefore, it was necessary to determine both when that expectation began and how long into the future it would extend. Consumers Energy contends on rehearing that the Commission erroneously found that the beginning of the reasonable expectation period ("L") should be January 1, 1990. Consumers Energy states that Order No. 888<sup>2</sup> does not directly address the issue of when L should begin. Therefore, according to Consumers Energy, the July 30 Order should have calculated L beginning on July 1, 1997, the departure date that Alma provided to Consumers Energy for its stranded cost scenarios.

In the July 30 Order, the Commission found that the hearing record clearly showed that Consumers Energy ceased entering into long-term purchase power contracts for the purpose of serving Alma and other native load customers at least as early as 1990. On this basis, the Commission rejected Consumers Energy's argument that the reasonable expectation period should begin on July 1, 1997. It stated: "Consumers Energy misapprehends the requirement that a potential departing generation customer give the utility a date on which it is considering substituting alternative generation. This requirement is merely a starting point from which the utility could begin to calculate a stranded cost estimate. The correct point for determining the beginning date of the

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<sup>2</sup>Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 (1996), order on reh'g, Order No. 888-A, 62 Fed. Reg. 12,274 (March 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), aff'd in part sub nom., Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000), cert. granted in part, 69 U.S.L.W. 3574 (U.S. Feb. 26, 2001).

reasonable expectation period is the date on which Consumers Energy finished incurring the costs to serve Alma that would be stranded by Alma's departure."<sup>3</sup>

Our finding that January 1, 1990 is the appropriate beginning date for L is logical and consistent with Order No. 888-A, while Consumers Energy's proposal is not. In Order No. 888-A, the Commission stated that it "bases the prospect of stranded cost recovery on the utility's ability to demonstrate that it incurred costs with the reasonable expectation that the customer would remain on its system."<sup>4</sup> Therefore, the relevant question is what was the utility's expectation at the time it incurred costs to serve the departing customer. The July 30 Order reasonably determined that January 1, 1990 represented the appropriate beginning date for L because that is when Consumers Energy ceased making long-term commitments (*i.e.*, finished incurring costs) to serve its load (including Alma).<sup>5</sup> Consistent with Order No. 888-A, Consumers Energy's expectation must be considered at the time of cost incurrence because it is that expectation, and the business decisions associated with it (*i.e.*, cost incurrence), that are relevant in determining Alma's stranded cost obligation. Consumers Energy's position is totally divorced from this concept and was therefore properly rejected in the July 30 Order. Consumers Energy has failed to persuade us on rehearing that we erred in finding that the reasonable expectation period begins on January 1, 1990 and thus rehearing is denied.

#### B. Duration of L

Consumers Energy argues that the July 30 Order erroneously found that the length of L should be 15 years. Consumers Energy alleges that the appropriate length of L is 30 years. In support of its argument, Consumers Energy states that it holds a franchise under the Michigan Foote Act (Foote Act). Michigan Foote Act, Public Act No. 264 (June 16, 1905). The holder of the Foote Act franchise has the right to use the public streets, alleys, highways, and rights of way of the city in exchange for providing the residents with power. Consumers Energy submits that its Foote Act franchise in Alma is perpetual,

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<sup>3</sup>96 FERC at 61,715. We note that the actual stranded cost calculation uses only the portion of L that remains from the date the customer departs the system. For example, in this case, L is 15 years, but if Alma departs in year 14 (2003), only one year of expectation remains. The calculation does not use the previous 14 years because Alma would have not yet departed. Therefore, there are no stranded costs during that period.

<sup>4</sup>Order No. 888-A at 30,555 n.499.

<sup>5</sup>As discussed in more detail below, Consumers Energy's expectation was that it could reasonably expect to continue to serve Alma for 15 years.

giving it the right to provide nondiscriminatory service to customers in Alma. Consumers Energy also contends that the weighted average remaining life of Consumers Energy's long-term power purchase contracts is 29 years, and that Consumers Energy has power purchase contracts with terms of up to 35 years. Therefore, Consumers Energy states that a reasonable duration for L is 30 years.

In the July 30 Order, we affirmed the Initial Decision's finding that Consumers Energy's planning horizon, not the Foote Act, is a reasonable measure of the duration of L, or expectation period.<sup>6</sup> The evidence relied on in the Initial Decision showed that in 1990 Consumers Energy's planning horizon was 15 years. We have been presented with no further evidence to warrant changing this finding and, therefore, we will deny Consumers Energy's request for rehearing. Because we also affirm on rehearing that the reasonable expectation period began on January 1, 1990, it follows that the reasonable expectation period extends for 15 years from January 1, 1990 through December 31, 2004.

C. Whether Distribution-Related Stranded Costs Should be Deducted From RSE

Consumers Energy asserts that the July 30 Order erred by affirming the Initial Decision's finding that distribution-related costs should be subtracted from the RSE and that alternatives (*i.e.*, sharing, brokering, or leasing Consumers Energy's system) to Alma's constructing its own distribution system could be considered. Consumers Energy states that the July 30 Order's reliance on the potential for Consumers Energy and Alma to enter into a sharing, brokering, or leasing arrangement as support for its finding that distribution costs would not be stranded was flawed because the brokering, sharing, leasing, and condemnation notions have not been proven on this record to be probable or likely. Consumers Energy states that it does not want to share, lease, or broker its distribution system to Alma, except pursuant to the Michigan Public Service Commission's (Michigan Commission) retail access program under which Alma would have to pay an estimated \$22 million in state stranded costs. Consumers Energy maintains that penalizing it by reducing its stranded cost recovery if it does not

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<sup>6</sup>96 FERC at 61,715. See also City of Las Cruces, New Mexico v. El Paso Electric Co., Opinion No. 438, 87 FERC ¶ 61,201 at 61,755 (1999) (Las Cruces) (the Commission rejected proposed reasonable expectation periods where unsupported by evidence on the record).

voluntarily agree to a sharing of its distribution system is an unlawful attempt by the Commission to accomplish indirectly what it cannot accomplish directly.<sup>7</sup>

The July 30 Order's finding that distribution-related costs should be deducted from RSE unless Alma willingly chooses to build its own distribution system is correct. While we did not compel Consumers Energy to enter into a brokering, sharing, or leasing arrangement with Alma, we stated that Consumers Energy cannot recover stranded costs as a result of its refusal to mitigate stranded costs. That fact that the brokering, sharing, or leasing concepts have not been proven on this record to be probable or likely does not preclude the Commission from making a policy finding, consistent with the requirements of Order No. 888, that Consumers Energy is required to mitigate its stranded costs. We will not require customers to pay for stranded costs that can be mitigated. Moreover, we find Consumers Energy's statement that it does not want to share, lease, or broker its distribution system to Alma, except pursuant to the Michigan Commission's retail access program under which Alma would have to pay an estimated \$22 million in state stranded costs, could be viewed as an attempt to foreclose competition by making it more costly for Alma to access alternative suppliers by Consumers Energy either agreeing to lease its distribution system to Alma in exchange for state-determined compensation for stranded costs (approximately \$22 million) or refusing to lease its system, which would force Alma to build its own system (which evidence indicates would cost approximately \$20 million).

In addition, we reject Consumers Energy's argument that we are trying to do indirectly what we cannot do directly. As we made clear in the July 30 order, we recognize that we cannot compel Consumers Energy to enter into a distribution agreement with Alma, and do not attempt to do so through our orders in this proceeding.<sup>8</sup> Instead, consistent with the mitigation obligation set forth in Order No. 888, we find that it would be inappropriate to provide recovery of distribution-related stranded costs where Consumers Energy has refused to enter into an arrangement with Alma for the use of its distribution system. To do so would effectively allow Consumers Energy to force Alma

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<sup>7</sup>Consumers Energy cites, *e.g.*, *Altamont Gas Transmission Co. v. FERC*, 92 F.3d 1239 (D.C. Cir. 1996), *cert. denied sub nom.*, *Indicated Expansion Shippers v. FERC*, 520 U.S. 1204 (1997), as support for its argument.

<sup>8</sup>The cases that Consumers Energy cites to support its argument that we are attempting to accomplish indirectly what we cannot do directly are inapposite because they did not involve the situation with which we are presented here: avoiding contravention of the requirement in Order No. 888 that a utility use all means at its disposal to mitigate stranded costs.

to incur distribution-related stranded costs that could have been mitigated by Consumers Energy.<sup>9</sup> Thus, Consumers Energy misconstrues our actions by describing them as "[p]enalizing [Consumers Energy] by reducing its stranded cost recovery if [Consumers Energy] does not voluntarily agree to a sharing of its distribution system."<sup>10</sup> Consistent with Order No. 888, we are attempting to ensure that Alma is not required to pay stranded costs that result from Consumers Energy's refusal to mitigate costs.

Consumers Energy also argues that the subtraction from RSE of the distribution system-related revenues violates Order No. 888's prohibition against an asset-by-asset approach. Consumers Energy is wrong. As we stated in Las Cruces: "The asset-by-asset approach rejected in Order No. 888 involved proposals to calculate stranded costs based on a review of uneconomic assets (including contractual liabilities, regulatory assets, and certain social program costs) for the purpose of developing a total company estimate of stranded costs that could then be allocated among customers to determine a hypothetical cost-of-service measure of stranded cost liability."<sup>11</sup> In Order No. 888, the Commission adopted a revenues lost approach, which calculates stranded costs as customers depart the system, and not on a total company basis as is the case with the asset-by-asset approach. The issue here is the proper revenues lost methodology, *i.e.*, whether distribution-related revenues are properly deducted from RSE when calculating Alma's stranded cost obligation. Consumers Energy's attempt to classify this issue as one that has been previously rejected is off-point and thus we deny rehearing.

D. Whether Alternatives to Alma's Proposed Construction of its Own Distribution System Should Have Been Considered

Consumers Energy contends that the Commission erred in finding that it was procedurally proper for the judge to consider distribution alternatives to what Alma proposed in its petition for declaratory order. Consumers Energy adds that consideration of alternatives is not supported by precedent, Order No. 888, or the hearing order issued by the Commission in this proceeding.<sup>12</sup> Consumers Energy maintains that since Alma instituted this proceeding by filing a petition for declaratory order, the proceeding is limited to the facts presented in the original petition unless Alma amends its petition or refiles to reflect a change in the facts. Consumers Energy contends that consideration of

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<sup>9</sup>96 FERC at 61,719.

<sup>10</sup>Rehearing request at 17.

<sup>11</sup>87 FERC at 61,755.

<sup>12</sup>City of Alma, Michigan, 80 FERC ¶ 61,265 (1997).

alternatives to building a distribution system is inappropriate because Alma already proposed to construct its own municipal system to compete with Consumers Energy. Thus, Consumers Energy concludes, the July 30 Order affirmed a situation where a judge went beyond the parameters of the petition for declaratory order and premised her decisions on legal structures that the Commission cannot compel, that one essential party is not in favor of (*i.e.*, Consumers Energy), and, in the case of condemnation, that both parties are on record as opposing.

We disagree with Consumers Energy. We stated in the July 30 Order that “the alternatives considered by the judge were discussed in Alma’s and Staff’s testimony, and responded to by Consumers Energy. If Consumers Energy believed that the parties exceeded the parameters of the Commission’s jurisdiction, Consumers Energy could have moved to strike the testimony. However, Consumers Energy made no such motion.”<sup>13</sup>

The Commission orders:

Consumers Energy's request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

( S E A L )

David P. Boergers,  
Secretary.

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<sup>13</sup>96 FERC at 61,718 (footnote omitted).